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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 902

TRAVEL CONSULTANTS, INC., *Petitioner*,

v.

TRAVEL MANAGEMENT CORP., *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Travel Consultants, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on September 28, 1966.

CITATION TO OPINION BELOW

The District Court for the District of Columbia filed no opinion in this case. The opinion of the Circuit Court of Appeals is printed in Appendix A hereto (*infra* pp. 1a-8a) and is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on September 28, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Under the United States Arbitration Act, must the District Court itself hear and determine the question whether the issues presented by litigation before it are contractually subject to binding arbitration; or may the District Court refer that question to the arbitration proceeding for determination?

2. Under § 3 of the United States Arbitration Act, is a party which has breached a contract containing an arbitration provision entitled to a stay, pending arbitration, of a court action for an accounting and damages based upon that breach, notwithstanding the breach; or does the breach constitute a "default in proceeding with such arbitration" which precludes such a stay?

3. Under § 3 of the United States Arbitration Act, when grounds exist at law or in equity for the revocation of a contract containing an arbitration provision, may the District Court summarily stay litigation of the contract pending arbitration over the objection of the party in whose favor the grounds exist, and without determining the validity of those grounds?

4. When arbitration proceedings involve controlling issues identical with issues pending before the District Court in an action between the same parties and not subject to arbitration, should the District Court enjoin

the arbitration proceedings pendente lite notwithstanding the provisions of the United States Arbitration Act?

STATUTE INVOLVED

The statutory provisions involved are sections 2 and 3 of the United States Arbitration Act, 61 Stat. 669, 9 U.S.C. §§ 2 and 3. They are printed in Appendix B (*infra,* pp. 8a-9a).

STATEMENT OF THE CASE

a. Summary

This petition seeks interlocutory review of the denial of a preliminary injunction pendente lite against an arbitration proceeding. Petitioner is a small, locally-owned, District of Columbia travel agency. Respondent, a Delaware corporation authorized to do business in the District of Columbia, is a combination of various travel agencies. Petitioner and respondent are involved in a dispute relating principally to three written contracts they simultaneously entered into so as to correlate their respective travel businesses. Their dispute culminated when the respondent filed a specific performance action against the petitioner in the United States District Court for the District of Columbia on one of the contracts, and on the same day pursuant to another of the contracts instituted arbitration proceedings against the petitioner with the American Arbitration Association. Aspects of this dispute involving crucial common issues were thus brought before two separate tribunals, where they are presently pending.

The petitioner is seeking to bring the entire dispute before a single forum—either the court or the arbitrator—so as to obtain a fair, equitable, complete, and final resolution of it and to avoid the intolerably wasteful and damaging burdens of unnecessary and harassing double litigation which threatens to be wholly disruptive of petitioner's business. To these ends, and because petitioner contends that it is not bound by any existing contract to submit to the projected arbitration and has a constitutional right to have the whole dispute tried and determined by the District Court, the petitioner seasonably moved in the District Court for a preliminary injunction staying the arbitration proceedings pendente lite. The District Court denied petitioner's motion, and on respondent's motion stayed, pending arbitration, the second defense and counterclaim that petitioner had filed in respondent's action against it. This order was affirmed on September 28, 1966, by the United States Court of Appeals for the District of Columbia Circuit, insofar as that court determined it had interlocutory appellate jurisdiction to review it. The arbitration proceeding remains in abeyance, awaiting a ruling upon this petition by this court.

b. The contractual arrangements

On August 7, 1962, the petitioner, the respondent, and petitioner's founder and principal employee, N. Sidney Nyhus, entered into a series of related and interdependent agreements whereby these three parties sought to coordinate their business activities under the executive direction of Mr. Nyhus, an expert in the travel field with unique qualifications to perform this function (R. 37). The principal agreements involved were a stock purchase agreement (R. 6), a sales agreement (R. 17), and an employment agreement (R. 22). In the stock purchase agreement, petitioner agreed to purchase from time to time a total of 50,000 shares of respondent's common stock for $100,000, with the timing of the purchases made dependent upon the amount of petitioner's annual profits. By the sales agreement, respondent was made petitioner's exclusive agent to make all arrangements for foreign land travel of petitioner's travel customers, with provision for the respondent to share in petitioner's profits. Under the employment agreement, Mr. Nyhus was hired by respondent on a full-time basis to conduct respondent's business and perform respondent's obligations under the sales agreement.

The sales agreement contains this arbitration clause:

> 10. Any controversy or claim arising out of, or in connection with this Agreement or the breach thereof, shall be determined by arbitration pursuant to the rules then obtaining of the American Arbitration Association and the laws of the District of Columbia. Such arbitration shall be held in the District of Columbia.

The other agreements contain no arbitration clause (R. 48).

c. The District Court action

On August 3, 1965, respondent brought the present action in the District Court for specific performance of the stock purchase agreement, alleging that petitioner had defaulted in its installment payments and that respondent had no adequate remedy at law (R. 3). On the same day, respondent also instituted arbitration proceedings against the petitioner under the sales agreement, alleging various breaches of the agreement and seeking an accounting, damages and specific performance (R. 29).

In the court action, petitioner's answer (R. 14) denied that respondent was entitled to specific performance of the stock purchase agreement. Petitioner's answer included a "second defense and counterclaim" (R. 15) which alleged that the three agreements of August 7, 1962, were "in the contemplation of the parties, as well as in practical operating fact, interdependent, and each was entered into in consideration of and reliance upon the other two agreements, as part of a unitary, contractual undertaking by the signatories thereto." The petitioner particularly averred that the sales agreement was commercially impossible of performance by the respondent but for the coordinated administration of it through the personal services of Mr. Nyhus, as provided by the employment agreement, because of Mr. Nyhus' specific familiarity and expertness in its business operations; and that the stock purchase agreement looked to the petitioner's profits from the combined consolidated operations with the respondent under Mr. Nyhus' executive direction, as both a source of funds for the petitioner's purchase of stock and the measure of petitioner's obligation to make certain purchases. The petitioner also averred that the parties performed their respective obligations under these three interdependent agreements until the employment agreement was terminated by the mutual consent of the respondent and Mr. Nyhus on May 31, 1964, and that thereafter the respondent was unable to and did not perform its obligations to the petitioner under the sales agreement, to the petitioner's damage, and the obligations of the petitioner to purchase respondent's capital stock pursuant to the stock purchase agreement abated and terminated. Finally the petitioner averred that the principal issues involved in the arbitration proceeding are identical with those arising under the complaint and petitioner's counterclaim so that the arbitration proceeding should be stayed during the pendency of the action.

As counterclaimant, petitioner prayed for an accounting between the parties "so that their respective obligations to one another under the stock purchase agreement and the sales agreement and the termination of said agreements may be fully determined and adjudicated;" that the petitioner be awarded damages for respondent's nonperformance of its obligations under the sales agreement; that respondent be restrained from taking any further action seeking to enforce the stock purchase agreement and the sales agreement; and for general equitable relief (R. 16-17).

d. Petitioner's motion for a preliminary injunction

Petitioner promptly requested the arbitration tribunal to stay the arbitration, pending disposition of the District Court proceedings. The arbitration tribunal advised the parties that after reviewing their contentions it had "determined that an issue as to arbitrability exists which must be determined either by an arbitrator or by the courts" and that it would proceed with the arbitration of this question unless respondent were stayed by court order (R. 41). Accordingly, petitioner promptly moved for a preliminary injunction staying and suspending pendente lite the arbitration proceedings (R. 33). An affidavit by Mr. Nyhus (R. 34) verifying petitioner's counterclaim, was filed in support of the motion together with a detailed affidavit of petitioner's president (R. 36) showing the irreparable injury which the simultaneous arbitration and litigation of identical critical issues would inflict upon the petitioner. No counter-affidavits were filed by respondent.

e. Respondent's motion to stay petitioner's second defense and counterclaim, pending arbitration

Respondent moved for an order staying proceedings on petitioner's second defense and counterclaim "insofar as it raises issues, claims and controversies under the sales agreement . . . pending determination by arbitration of issues, claims and controversies thereunder, in accordance with the arbitration agreement contained in the sales agreement" (R. 32) basing its motion upon section 3 of the United States Arbitration Act (9 U.S.C. § 3). Although the motion was grounded upon the arbitration clause hereinbefore cited, no supporting affidavits were filed and no showing was made that the arbitration clause or indeed the sales agreement itself represented an existing contract surviving the respondent's own breach and repudiation, and currently binding the petitioner to arbitrate at the respondent's election. Moreover, the respondent did not dispute that the impending arbitration was directed to the question of arbitrability.

f. The District Court's findings, conclusions and order

On November 23, 1965, after hearing arguments but receiving no evidence apart from petitioner's affidavits above referred to, the court entered its findings of fact and conclusions of law (R. 42). It made no findings of fact with respect to the controverted questions put in issue by the petitioner's second defense and counterclaim, including the issues of interdependence and termination of the sales agreement. It found the respondent not to be in default in proceeding with the arbitration of the sales agreement and that no irreparable harm would be suffered by the petitioner through the enforcement of the agreement for arbitration contained in the sales agreement. In its conclusions of law the court ruled that the allegations of petitioner's second defense and counterclaim relating to interdependence and terminability of the sales agreement and the stock-purchase agreement are at variance with the written contract; that respondent is entitled to a stay of proceedings, pursuant to section 3 of the United States Arbitration Act on appellant's second defense and counterclaim insofar as it raises issues under the sales agreement; and that petitioner's motion for a preliminary injunction is "without merit" (R. 42-44).

The District Court filed no opinion nor did it cite any legal authority for its findings, conclusions, and order, except for the United States Arbitration Act itself.

g. The Court of Appeals decision

On September 28, 1966, the Court of Appeals affirmed the action of the District Court in denying petitioner's motion to enjoin arbitration and in staying proceedings on petitioner's counterclaim, pending arbitration under the sales agreement (R. 47). However the Court of Appeals held that it lacked jurisdiction to review, as an interlocutory matter, the District Court's decision insofar as it stayed petitioner's defense to respondent's action for specific performance of the stock purchase agreement. The Court of Appeals opinion deals in major part with the jurisdictional question, and no precedents are cited in connection with the substantial points raised by the appeal. Parsing the contracts in issue, the Court of Appeals held that whether the agreements be independent or interdependent is immaterial for purposes of determining whether petitioner is bound to arbitrate. With respect to the burden on petitioner of pursuing two actions concurrently in two different forums, it held that the burden falls upon petitioner because it signed two different agreements with the same party, one requiring arbitration and the other containing no arbitration provision. Stating that the respondent "shouldered the burden voluntarily" when it signed the agreements in question, the Court of Appeals could "see no basis for judicial interposition."

REASONS FOR GRANTING THE WRIT

1. The decision of the court below directly conflicts with controlling decisions of this Court construing the United States Arbitration Act. The arbitration sought to be enjoined by petitioner is for the express purpose of determining the arbitrability of a controversy between the parties. This Court has repeatedly held that the arbitrability of a controversy is to be resolved by the courts, and not by the arbitrator. Whether or not a party is bound to arbitrate, as well as what issues it must arbitrate, are matters to be determined by the courts on the basis of the contract entered into by the party, and are not matters to be determined by the arbitrator. See *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 546-547 (1964); *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, 241 (1962). See also *Necchi* v. *Necchi Sewing Machine Sales Corp.*, 348 F. 2d 693 (2d Cir. 1965) certiorari denied 383 U.S. 909. Moreover, this Court has also held that a party cannot be required to submit to arbitration any dispute which it

is not contractually bound so to submit. See *Atkinson, supra.* Despite these settled rules, the court below, by summarily denying the petitioner a preliminary injunction and staying petitioner's second defense and counterclaim, compelled arbitration without first trying and determining two essential questions: (a) Whether the contract under which arbitration is sought, and which petitioner asserts to be defunct, has survived respondent's breach so as to be enforcible by respondent through arbitration proceedings; and (b) If the arbitration contract be not defunct, what issues are encompassed by it.

2. The decision of the court below is in direct conflict with the decision of the Seventh Circuit in *Cuneo Press v. Kokomo Paper Handlers Union No. 34,* 235 F. 2d 108 (1956) certiorari denied 352 U.S. 912. In practical effect, it gives the respondent specific enforcement of a contract which the respondent has breached and holds the respondent to be entitled to arbitration irrespective of any question of respondent's breach. In the *Cuneo* case, breach of the contract was held to debar the party guilty of the breach from any right to a stay pursuant to § 3 of the United States Arbitration Act of a suit brought against it on the contract for an injunction and damages occasioned by the breach. Here, the courts below did not illuminate the bases for their decisions on the substantive issues which they ruled upon by the citation of any authority or by the elaboration of their legal reasoning. However, their summary denial of petitioner's motion for preliminary injunction and their stay of petitioner's second defense and counterclaim necessarily involved the determination that the respondent was entitled to equitable relief tantamount to specific performance of the arbitration

contract despite its breach thereof as averred by the petitioner and supported by petitioner's uncontroverted affidavits.

The *Cuneo* decision also required the party seeking enforcement of rights under the arbitration provision to make an affirmative showing that it was "not in default" and held that a mere recital to that effect was ineffective to serve as such a showing. In the present case, the respondent made no showing whatever in this respect.

3. The decision of the court below is also in direct conflict with the Second Circuit decision in *El Hoss Engineering and Transportation Co.* v. *American Independent Oil Co.,* 289 F. 2d 346 (1961) certiorari denied 368 U.S. 837 where the Court of Appeals held that the parties were entitled to a full trial to determine whether contractual relationships existing between them subjected their controversy to compulsory arbitration. In the instant case there was no trial whatever. Instead there was a summary ruling sustaining arbitration despite the existence of a substantial factual dispute about the true intention of the parties with respect to arbitration as that intention is evidenced by the contract containing the arbitration clause, and by the circumstances attending its execution. From the terms of the contract, it seems reasonable to believe that the parties intended only to resort to arbitration in lieu of litigation, and to do so for the obvious purpose of eliminating its concomitant burdens. The contract does not provide for particularly qualified arbitrators gifted with special commercial insights relevant to the solution of problems anticipated to arise under the contract: it provides for a referee, not for an expert. Nothing in the contract suggests that the parties intended to re-

sort to arbitration in addition to litigation, and thus to incur additional burdens. Moreover the absence of the arbitration clause from the other simultaneously executed contracts tends to evidence an intent to limit the scope of arbitration so that it would not encompass issues transcending the sales agreement.

4. The decision of the court below also conflicts with the decision of the Fourth Circuit in *Leesona Corp.* v. *Cotwool Mfg. Corp.,* 315 F. 2d 538 (1963) sustaining the grant of a preliminary injunction pendente lite against an arbitration proceeding which would have adjudicated issues between parties to the litigation identical with the issues pending before the trial court. The petitioner placed principal reliance upon the *Leesona* case in the court below, in part because the "staunch, practical reason" which justified the injunction pendente lite against the parallel and duplicative arbitration proceeding in *Leesona* is here present: "The ruling of the . . . Federal Court . . . [upon issues also involved in the arbitration] will be highly persuasive, if not dispositive, in the decision of the arbitrator." (315 F. 2d at 541)

By failing to deal with the unitary controversy between the petitioner and the respondent as a matter calling for the careful exercise of the court's conventional equity jurisdiction to determine the parties' respective rights in an orderly and dispositive manner before a single tribunal, and by permitting the respondent to proceed against the petitioner so as simultaneously to arbitrate and to litigate the same issues and thus proliferate and compound the controversy, the court below departed sharply from the ruling in *Leesona.* It did not give proper weight to those traditional and overriding principles of equity jurisprudence which require a more condign and less oppressive and wasteful procedure. Here, the court below failed to recognize the essential characteristics of the United States Arbitration Act as a procedural dispensation conferring equitable powers upon the court, to be exercised consistently with traditional principles of equity, and giving rise to procedural rights which yield to countervailing equities.

As the Chief Justice and Mr. Justice Black pointed out in their concurring opinion in *Moseley* v. *Electronic & Missile Facilities, Inc.*, 374 U.S. 167 (1963), in construing the United States Arbitration Act the Court has left open a question of great importance: "Can any person, before any dispute has arisen, agree to arbitrate all future disputes he may have and thereby lose his right to go to court to try his claim according to due process of law?" (374 U.S. at 172-173). Important aspects of that question are presented by this petition. Because the United States Arbitration Act enables the courts to grant effective enforcement to contracts which would substitute private determinations for the regular procedures of the law which are guaranteed by the United States Constitution—e.g., due process and trial by jury—the Act should be strictly construed and must be administered consistently with established equity jurisprudence. In the present case the court below did neither. Instead it extended the Act so as to cover matters other than those certainly bargained for and so as to reach a result inconsistent with the intent of the parties at the time of the bargain. On these points also, the decision below is in conflict with *Leesona*.

CONCLUSION

In the court below, the respondent relied principally upon *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc.*, 271 F. 2d 402 (2d Cir. 1959) as requiring the denial of petitioner's motion for a preliminary injunction and the staying of petitioner's second defense and counterclaim. The *Robert Lawrence* case is directly in conflict with the Sixth Circuit decision in *American Airlines, Inc.* v. *Louisville and Jefferson County Air Board*, 269 F. 2d 811 (1959), a case upon which the petitioner relied in the court below, and with *Ross* v. *Twentieth Century—Fox Film Corp.*, 236 F. 2d 632 (9th Cir. 1956). Moreover, the *Robert Lawrence* case is persuasive authority for the proposition that this Court should grant the instant petition: it granted certiorari in the *Robert Lawrence* case (362 U.S. 909) only to have the petition dismissed by stipulation of the parties pursuant to Rule 60 (364 U.S. 801). If the *Robert Lawrence* precedent supports the decision of the court below, then the same important, fundamental questions of the constitutionality, construction, and application of the United States Arbitration Act presented by that case are involved in this case, and still await authoritative decision by this court. See *Moseley* v. *Electronic & Missile Facilities, Inc.*, 374 U.S. 167 (1963). Accordingly, and for the reasons hereinbefore set forth, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the United States Court of Appeals for the District of Columbia Circuit in this Case

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,878

TRAVEL CONSULTANTS, INC., *Appellant,*

v.

TRAVEL MANAGEMENT CORPORATION, *Appellee*

Appeal from the United States District Court
for the District of Columbia

Decided September 28, 1966

Mr. Worth Rowley for appellant. *Mr. Lenox G. Cooper* also entered an appearance for appellant.

Mr. Lucien Hilmer, with whom *Mr. J. H. Krug* was on the brief, for appellee.

Before BASTIAN, *Senior Circuit Judge,* BURGER and LEVENTHAL, *Circuit Judges.*

LEVENTHAL, *Circuit Judge:* Appellant Travel Consultants, Inc., (Consultants) is a District of Columbia travel agency. Appellee Travel Management Corp. (Management) is a Delaware corporation authorized to do business in the District of Columbia. On August 7, 1962, three agreements were entered into which Consultants says, and we will assume, constitute an integrated series of agreements for the purpose of coordinating the two businesses.

In the Stock Purchase Agreement, Consultants agreed to purchase 50,000 shares of Management for $100,000. In the Sales Agreement, Consultants designated Management as its wholesale agent for the placement of travel services sold by Consultants, in Washington or elsewhere, with provision for Management to share in the profits of Consultants. Under the "Employment Agreement" Mr. N. Sidney Nyhus, the founder and principal employee of Consultants, was hired by Management on a full-time basis in an executive capacity.

The Sales Agreement contained this arbitration clause:

> 10. Any controversy or claim arising out of, or in connection with this Agreement or the breach thereof shall be determined by arbitration pursuant to the rules then obtaining of the American Arbitration Association and the laws of the District of Columbia. Such arbitration shall be held in the District of Columbia.

The other agreements contained no arbitration clause.

On August 3, 1965, Management brought this action in the District Court for specific performance of the Stock Purchase Agreement, alleging that Consultants had defaulted in its installment payments, and that Management had no adequate remedy at law. On the same day Mangement instituted arbitration proceedings against Consultants under the Sales Agreement, alleging various breaches of the agreement and seeking an accounting, damages and specific performance.

In the court action, the answer of Consultants denied that Management was entitled to specific performance of the Stock Purchase Agreement. Consultants also interposed a "Second Defense and Counterclaim," which alleged that the three agreements of August 7, 1962 were interdependent,[1] that each was "entered into in consideration of and reliance upon the other two Agreements;" that after termination of the Employment Agreement by mutual consent of Management and Nyhus, Management had been unable to perform its obligations under the Sales Agreement, and that this default terminated the obligations of Consultants under the Stock Purchase Agreement; and that because of the interdependency of the Agreements, the issues in the lawsuit and the arbitration proceeding were the same, so that arbitration should be stayed pending the court action. As counterclaimant Consultants prayed as follows:

> a. That the Court order an accounting between the parties to this action so that their respective obligations to one another under the Stock Purchase Agreement and the Sales Agreement and the termination of said Agreements may be fully determined and adjudicated;
>
> b. That the defendant be awarded his damages for the plaintiff's nonperformance of its obligations to defendant under the Sales Agreement, as aforesaid;
>
> c. That the plaintiff be restrained and enjoined from taking any further action seeking to enforce the Stock Purchase Agreement and the Sales Agreement; and

---

[1] Consultants alleged that:

> The Sales Agreement was commercially impossible of performance by the plaintiff (Management) but for the coordinated administration of it through the personal service of Mr. Nyhus, as provided by the Employment Agreement, because of Mr. Nyhus, specific familiarity and expertness in the business operations of the defendant (Consultants). The Stock Purchase Agreement looked to the defendant's (Consultants) profits under Mr. Nyhus' executive direction, as both a source of funds for the defendant's (Consultants) purchase of stock and the measure of its obligation to make certain purchases.

d. That the defendant be granted such other and further relief as to the Court seems meet and justice may require.

Management's reply to the counterclaim interposed the defense that any claim of Consultants based on the Sales Agreement was referable to arbitration. Management moved under § 3 of the Arbitration Act, 9 U.S.C. § 3, to stay proceedings on Consultants' second defense and counterclaim "insofar as it raises issues, claims and controversies under the Sales Agreement," Consultants filed a counter-motion to stay the arbitration pendente lite. The District Court granted Management's motion and denied Consultants' motion.

Management contends that this court has no jurisdiction to hear the appeal filed by Consultants. Admittedly, the District Court's order is not an appealable final decision within the meaning of 28 U.S.C. § 1291. The question is whether jurisdiction over the appeal lies under 28 U.S.C. § 1292(a)(1), which permits appeals from "interlocutory orders . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions. . . ." In a series of decisions culminating in *Baltimore Contractors, Inc.* v. *Bodinger,* 348 U.S. 176 (1955), the Supreme Court has held that some stays by trial courts of court proceedings pending arbitration amount to "injunctions" for the purpose of § 1292(a)(1). Where the stay sought is of an action that would have been an action at law before the fusion of law and equity, the grant or denial of such stay is appealable;[2] where the order stays an action that would have been brought in equity before the merger, the order is not appealable.[3] The theory is that the stay, if sought of a law action, is analogous to a chancellor enjoining proceedings in the law court, a separate forum, whereas a stay of an equitable action represents merely an ordering of judicial business in a single proceeding in equity. This residue of the historic law-equity distinction has been sharply criticized.[4] But *Baltimore Contractors* makes clear that the Supreme Court appreciated that "the incongruity of taking jurisdiction from a stay in a law type and denying jurisdiction in an equity type proceeding springs from the persistence of outmoded procedural differentiations." The Court was aware that "simplification would follow from an assumption or denial of jurisdiction in both." Yet the Court concluded the distinction was rooted in the precedents and should be followed. 348 U.S. at 184-85.

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[2] *E.g.,* Ettleson v. Metropolitan Life Ins. Co., 317 U.S. 188 (1942); Enelow v. New York Life Ins. Co., 293 U.S. 379 (1935); Council of Western Elec. Technical Employees v. Western Elec. Co., 238 F.2d 892 (2d Cir. 1956).

And so to determine jurisdiction we must ascertain whether the order appealed from was one relating to an action at law or in equity. Management's action for specific performance of the Stock Purchase Agreement is equitable. But the order stays proceedings on Consultants' second defense and counterclaim. In that pleading Consultants did essentially two things: First, it interposed a defense to Management's equitable action, on the theory that its obligations under the Stock Purchase Agreement were terminated when Management failed to perform its obligations under the Sales Agreement. Second, it set out a counterclaim based upon Management's alleged breach of the Sales Agreement. Consultants' defense, though based upon its claims under the Sales Agreement, is clearly, as a responsive pleading, part and parcel of the equity suit brought by Management. Insofar as the District Court's order stays the proceeding on this defense pending arbitration, the order is a stay in and of an equitable proceeding that is not appealable under the *Baltimore Contractors* rule.

---

[3] *E.g.,* Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176 (1955); City of Morgantown v. Royal Ins. Co., 337 U.S. 254 (1949); Alexander v. Pacific Maritime Ass'n, 332 F.2d 266 (9th Cir.), *cert. denied,* 379 U.S. 882 (1964); Kirschner v. West Co., 300 F.2d 133 (3d Cir. 1962).

[4] See 7A MOORE, FEDERAL PRACTICE § 1292, at JC-424-27 (2d ed. 1966).

The counterclaim, however, seems to us to be essentially an action at law, for breach of the Sales Agreement. Consultants sought damages and demanded a jury trial. This action was not divested of its character as an action at law because Consultants also asked for an accounting of the parties' respective obligations under the two Agreements, as well as "such other and further relief as to the Court seems meet and justice may require." Appealability of an order restraining a legal action is, we think, governed by the same principles whether the legal claim is asserted by counterclaim or in an initial action. We conclude that the order staying the counterclaim pending arbitration is appealable under § 1292(a)(1).

We are aware of the anomaly in taking jurisdiction of the appeal from one part of the order but not of the appeal of the other part. This ensues from the premise of *Baltimore Contractors.* There may be cases where the legal action set forth in a pleading is so subordinate as to require that it be overlooked for purposes of denying an interlocutory appeal. See *Alexander* v. *Pacific Maritime Ass'n, supra* note 3. Here, however, Consultants presents a distinct action for damages under the Sales Agreement. We believe it our duty to persist with the anomalous rule unless and until it is changed by Congress or the Supreme Court. The anomaly may be mitigated by recourse to the provisions added by Congress in 1958, 28 U.S.C. § 1292(b), whereby the courts may permit appeal of the entire order and not merely the portion appealable as of right.

On the merits we are in agreement with the District Court. The issues raised by the counterclaim are committed to arbitration by the arbitration clause of the Sales Agreement. That clause, set out above, is extremely broad, covering "any controversy or claim arising out of, or in connection with this Agreement *or the breach thereof.*" (Emphasis added.) We see no reason for reading into the simultaneously executed Stock Agreement, which contains no arbitration clause, any qualification upon the parties' obligation to arbitrate disputes under the Sales Agreement. Whether the agreements are independent or interdependent is immaterial for purposes of determining whether Consultants was bound to arbitrate its claims under the Sales Agreement. Consultants cannot escape the effect of the arbitration clause by arguing that the Sales Agreement questions are affected by issues under the Employment Agreement, or that the arbitration of the Sales Agreement questions will affect the resolution of issues in the litigation under the Stock Purchase Agreement. Neither the arbitration clause itself, nor the stay of the counterclaim, prevents Consultants from pursuing its theory that the three agreements of August 7, 1962, are interdependent. However, its argument that Management defaulted on the Sales Agreement when it terminated the Employment Agreement must be presented in the arbitration proceeding under the Sales Agreement. Consultants may present to the court its theory that Management's breach of the Sales Agreement excused the failure of Consultants to perform under the Stock Purchase Agreement. In granting Management's motion for stay, the District Judge stated that the allegations of Consultants with respect to interdependence "are at variance with the written contracts." It is not certain whether or not he intended to foredoom Consultants' defense completely. Since this relates to the defense to the action for specific performance, and not to the counterclaim, the issue is not before us now, and Consultants' rights in that respect are not touched by our decision.

Consultants complains of the burden of pursuing two actions concurrently in two different forums, and asks for a ruling that either all or none of the actions be referred to arbitration. That burden falls on Consultants because it signed two different agreements with the same party, one requiring arbitration, and the other containing no arbitration provision. Consultants shouldered that burden voluntarily, and we see no basis for judicial interposition.

Insofar as the order appealed from stays Consultants' counterclaim pending arbitration under the Sales Agreement and denies Consultants' motion to enjoin arbitration, it is affirmed. Insofar as the order stays proceedings on Consultants' defense to Management's action for specific performance on the Stock Purchase Agreement, this court lacks jurisdiction and expresses no opinion; the appeal from that part of the order is dismissed.

It is so ordered.

APPENDIX B

United States Arbitration Act, Sections 2 and 3

(61 Stat. 699; 9 U.S.C. §§ 2-3)

§ 2. *Validity, irrevocability, and enforcement of agreement to arbitrate.*

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§ 3. *Stay of proceedings where issue therein referable to arbitration.*

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

SUPREME COURT, U.S.

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 902

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v.

TRAVEL MANAGEMENT CORP., *Respondent*.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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STATEMENT OF THE CASE

For an accurate and unvarnished statement of the case, without distortion of substance or chronology, reference is made to the first three and one-half pages of the opinion below (Pet. App. A, pp. 1a-4a).[1]

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[1] The terms, conditions and purposes of the two contracts between the parties appear in the contracts themselves (R6, 17). The employment agreement between respondent and Mr. Nyhus appears at R22. As to the Stock Purchase Agreement, the substantive dispute appears in the pleadings below (R3, 14); as to the Sales Agreement, the substantive dispute appears in respondent's demand filed with the American Arbitration Association (R29) and in petitioner's disputed counterclaim filed in the District Court (R15, 31).

The Alleged "Questions Presented" Are Fictitious

The petition recites four questions which it claims are presented in this case (Pet., p. 2); but all four are fictitious.

1. Whether the question of arbitrability may be referred by the District Court to the arbitrator is not involved. Here, both parties moved the court to determine the question of arbitrability, and the court made that determination (R. 32, 33, 42). It held that the controversies and claims under the Sales Agreement are referable to arbitration (R. 44).

2. Whether a breach of contract constitutes a default in proceeding with arbitration under § 3 of the Arbitration Act is a question likewise not presented. Contrary to petitioner's assertion, the merits of the conflicting claims under the Sales Agreement remain unresolved. Respondent still seeks to determine its claim through arbitration, petitioner through litigation (R. 29, 16-17). It is indisputable that there was no default in proceeding with arbitration. Petitioner itself alleged respondent's timely institution of the proceeding (R. 16, 29); and the District Court specifically found that respondent was "not in default in proceeding with arbitration under the Sales Agreement" (R. 43).

3. Whether the District Court may stay litigation of a contract pending arbitration, without determining whether grounds exist for revocation of the arbitration provision, is another question that is not involved. Here, no grounds have ever been asserted for revocation of the Sales Agreement or its arbitration provision. The execution and terms of the agreement are undisputed (R. 15, 17, 31). Nor is there any dispute as to its validity; both parties seek to enforce it, re-

spondent through the prescribed arbitration, petitioner through attempted litigation of its counterclaim (R. 19, 16-17).

4. The question whether the District Court should enjoin arbitration, when identical controlling issues are pending in an action before the court, is misleading. The only claims filed in arbitration were those relating to non-performance of the Sales Agreement (R. 29), whereas the pleadings in court relate primarily to the Stock Purchase Agreement (R. 3, 14). Only petitioner's "Second Defense and Counterclaim" attempts to litigate issues arising under the Sales Agreement (R. 15), and only those issues were held referable to arbitration (R. 42, Pet. App. A, pp. 7a-8a).

It is significant that nowhere in the body of the petition is any argument addressed directly to any of the alleged "questions presented".

The real question involved is whether petitioner's disputed claim under the Sales Agreement was properly held to be referable to arbitration. Petitioner's attempt to obtain a court determination on the merits, in disregard of the arbitration clause, was properly rejected by the courts below. The Circuit Court unanimously held (Pet., App. A, p. 7a):

> "The issues raised by the counterclaim are committed to arbitration by the arbitration clause of the Sales Agreement. That clause, set out above, is extremely broad, covering 'any controversy or claim arising out of, or in connection with this Agreement *or the breach thereof.'* (Emphasis added.) We so no reason for reading into the simultaneously executed Stock Agreement, which contains no arbitration clause, any qualification upon the parties' obligation to arbitrate disputes under the Sales Agreement. Whether the agree-

ments are independent or interdependent is immaterial for purposes of determining whether Consultants was bound to arbitrate its claims under the Sales Agreement. Consultants cannot escape the effect of the arbitration clause by arguing that the Sales Agreement questions are affected by issues under the Employment Agreement, or that the arbitration of the Sales Agreement questions will affect the resolution of issues in the litigation under the Stock Purchase Agreement.[2]

If, by alleging a breach of contract in a court action, a party could evade the arbitration clause of the contract, as petitioner seems to contend, the Arbitration Act and arbitration agreements generally would be reduced to a virtual nullity.

The Asserted Reasons for Granting the Writ Are Without Merit

1. Contrary to petitioner's assertion, the decision below does not conflict with controlling decisions of this Court; it follows those decisions. Where, as in petitioner's "Second Defense and Counterclaim", the claim on its face appears to be subject to the arbitration agreement, the court's sole function is to make that determination, stay litigation thereon and order

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[2] As to petitioner's claim that arbitration under the Sales Agreement and litigation under the Stock Purchase Agreement subject it to "double litigation" the unanimous court below held (Pet., App. A, p. 8a):

> "Consultants complains of the burden of pursuing two actions concurrently in two different forums, and asks for a ruling that either all or none of the actions be referred to arbitration. That burden falls on Consultants because it signed two different agreements with the same party, one requiring arbitration, and the other containing no arbitration provision. Consultants shouldered that burden voluntarily, and we see no basis for judicial interposition."

arbitration. *United Steel Workers* v. *American Mfg. Co.,* 363 U.S. 564 (1960). This Court held at page 567:

> "The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. *It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract.* Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for." (Emphasis supplied)

Justice Brennan, concurring, stated at page 571:

> "With that finding [that the arbitration clause commits the dispute to arbitration] the court will have exhausted its function, except to order the reluctant party to arbitration."

Moreover, this Court has held that a party may not evade arbitration, as petitioner attempts, by claiming a breach of contract by the moving party. In *Drake Bakeries, Inc.* v. *Local 50,* 370 U.S. 254, 262 (1962), this Court rejected the contention that a strike by the union excused the company from arbitrating, "upon theories of waiver, estoppel, or otherwise".

The decision below is in no way inconsistent with the Supreme Court cases cited by petitioner. *John Wiley & Sons, Inc.* v. *Livingston,* 376 U.S. 543 (1964) at 546-547 merely held that the court rather than the arbitrator was to decide whether an arbitration clause in a collective bargaining agreement was binding on a successor company (by merger) which had not signed the agreement. The successor company was held bound, thus resolving the question of arbitrability. No court heard evidence on the merits of the disputes, and this Court's unanimous opinion held at page 555:

> "Whether or not the Union's demands have merit will be determined by the arbitrator in light of the fully developed facts."

Atkinson v. *Sinclair Refining Co.*, 370 U.S. 238 (1962) at 241 held that, in view of the peculiar arbitration clause, it was for the court to determine whether the company "had agreed to arbitrate disputes of a particular kind." (See *John Wiley & Sons, Inc.* v. *Livingston, supra,* 376 U.S. at 547.)

Petitioner pretends that the courts below did not determine the question of arbitrability presented by the cross-motions; but that is the very question they did determine. They held that issues under the Sales Agreement, sought to be litigated by petitioner's "Second Defense and Counterclaim," are referable to arbitration.

2. Contrary to petitioner's assertion, the decision below does not conflict with *Cuneo Press, Inc.* v. *Kokomo Paper Handlers' Union,* 235 F. 2d 108 (C.A. 7, 1956). There the union went on a sit-down strike in violation of a no-strike clause and ignored the prescribed grievance and arbitration procedures until after the company had filed its court action. The court held that the union was "in default in proceeding with such arbitration" under § 3 of the Arbitration Act and that the strike had defeated the whole purpose of the arbitration clause leaving no issues referable to arbitration. No such circumstances exist here. Furthermore, insofar as the rationale of *Cuneo* related to the

effect of the strike as a breach, it was squarely rejected by this Court in *Drake Bakeries, Inc.* v. *Local 50, supra,* 370 U.S. at 262.

3. The decision below is not in conflict with *El Hoss Engineering & Transport Co., Ltd.* v. *American Independent Oil Co.,* 289 F. 2d 346 (C.A. 2, 1961). There the arbitration clause was conditioned on prior performance of specified conditions, and the contract showed "a clear intent . . . not to arbitrate any dispute with reference to whether there was a full performance of these threshold conditions." (289 F. 2d at 350.) Here, the arbitration clause is unconditional, and the question of arbitrability involves no such threshold issue.

4. The decision below does not conflict with *Leesona Corp.* v. *Cotwool Mfg. Corp.,* 315 F. 2d 538 (C.A. 4, 1963). The circumstances in that case were unique and materially different from those presented here. Leesona Corp., a patent holder, brought an infringment action against three defendants in the District Court for South Carolina. One of them, Whitin, before being made a defendant, had brought suit against Leesona in the District Court for Massachusetts, seeking a declaratory judgment that Leesona's patents were invalid. The South Carolina court transferred the action as against Whitin to the Massachusetts court and stayed its own proceedings against the other two defendants. None of the three defendants had any contractual relation, let alone any arbitration agreement, with Leesona. After its suit in South Carolina had been pending for more than one year, Leesona instituted arbitration proceedings against still a fourth party, Huber, with whom it had a license agreement containing an arbitration clause. The South Carolina court stayed

the arbitration, pending decision in Massachusetts. Upholding the stay as a reasonable exercise of the court's discretionary equity power, the Fourth Circuit court stressed three basic points which clearly distinguish the case: 1) The arbitration threatened irreparable injury to the others, who were never parties to the arbitration agreement. 2) In patent cases it is a well established practice to stay proceedings in one tribunal pending decision in another on the validity of the patent. 3) By waiting more than one year, Leesona was in default in proceeding with the arbitration.

Petitioner quotes out of context a sentence from the concurring opinion in *Moseley* v. *Electronic & Missile Facilities, Inc.,* 374 U.S. 167, 172 (1963) (Pet. 14). There a subcontractor sued the prime contractor in the District Court for Georgia under the Miller Act, which requires such actions to be brought in the District where the work is performed. The subcontractor contended that an arbitration clause calling for arbitration in New York had been induced by the defendant's fraud. This Court held that the District Court should proceed to trial on the allegation of fraud, which went "to the arbitration clause itself". Here, the issue of arbitrability has never involved any question whatever of fraud. The concurring opinion in *Mosley* simply noted that the Court's disposition left open important questions as to the applicability, effect and constitutionality of the Arbitration Act in relation to rights and remedies under the Miller Act. No such questions are involved here. This Court long ago upheld the Arbitration Act provisions for enforcement of arbitration agreements generally, as it has unanimously done in the later case of *John Wiley & Sons, Inc.* v. *Livingston, supra* (1964).

5. Contrary to petitioner's assertion (Pet. 15), respondent below did not rely principally on *Robert Lawrence Co., Inc.* v. *Devonshire Fabrics, Inc.*, 271 F. 2d 402 (C.A. 2, 1959). Respondent relied chiefly on *United Steel Workers* v. *American Mfg. Co., supra,* and *Drake Bakeries, Inc.* v. *Local 50, supra. Robert Lawrence* presented questions as to whether an arbitration could be enforced (1) despite a claim of fraud and (2) despite a claim of rescission, independent of fraud. As noted above, there is no issue of fraud here; nor is there any issue of rescission. *Robert Lawrence* was cited below for the view that an arbitration agreement cannot be evaded even by a claim of rescission. In short, no question left open by this Court's dismissal of the petition in *Robert Lawrence* has any application here.

CONCLUSION

Respondent instituted the arbitration proceeding August 3, 1965, seeking speedy resolution of the issues of non-performance under the Sales Agreement. Petitioner's attempts through litigation and relitigation to evade "the forum it agreed to use . . ." (*Drake Bakeries, supra,* at 266) have delayed the arbitation for almost 1½ years. The courts below unanimously rejected such attempts. No reason is presented to warant further review or delay.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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FEB 1 1967

JOHN F. DAVIS, CLERK

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OCTOBER TERM, 1966

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

A. None of the Questions Presented Is Fictitious

1. Whether the question of arbitrability may be referred by the District Court to the arbitrator is squarely involved. The only arbitration to which petitioner's motion for a preliminary injunction is directed is one whereby the question of arbitrability is to be heard and determined by the arbitrator (R 41). The District Court held a hearing on petitioner's motion for a preliminary injunction, not a trial to resolve the complicated and factually disputed matters involved in determining the issue of arbitrability. By holding the petitioner's motion for a preliminary

injunction to be "without merit" (R 44), and by staying petitioner's second defense and counterclaim pending arbitration, the District Court necessarily ruled that the disputed arbitrability question was to be determined by the arbitrator. To argue otherwise, as the respondent apparently attempts to, is to argue that the petitioner is entitled to no trial whatever of the issue of arbitrability.

2. Whether a breach of contract constitutes a default in proceeding with arbitration, precluding a stay under section 3 of the Arbitration Act, is a question inescapably presented. The District Court's finding that respondent was "not in default in proceeding with the arbitration" (R 43) is wholly unsupported by evidence, and does not reflect any factual determination about respondent's breach. Moreover, respondent concedes that the issue of its breach of contract under the sales agreement remains unresolved. The District Court, without hearing and determining this issue, stayed petitioner's second defense and counterclaim based upon the sales agreement, pending arbitration, and purported to do so under section 3 of the Arbitration Act (R 44). The District Court could lawfully take such summary action only if the breach of contract could not as a matter of law amount to a default precluding a stay under section 3.

3. Whether the District Court may stay litigation of a contract containing an arbitration provision, pending arbitration, when grounds exist at law or in equity for the revocation of that contract is a question directly involved in this case. That is what the District Court did, and what the Court of Appeals has reviewed. Petitioner's second defense and counterclaim (R 15), together with the uncontroverted supporting affidavits

of Mr. Nyhus (R 34) and Mr. Randall (R 36), showed respondent's breach of the sales agreement on May 31, 1964, when it discontinued the employment of Mr. Nyhus and thus made itself unable to perform its obligations under the sales agreement. Such repudiation of a contract is grounds for its revocation. Moreover, respondent's second defense and counterclaim prays for an accounting between the parties "so that their respective obligations to one another under the Stock Purchase Agreement and the Sales Agreement *and the termination of said Agreements* may be fully determined and adjudicated" (R 16-17; emphasis supplied). In the light of this, respondent's argument that "no grounds have ever been asserted for revocation of the sales agreement" is incredible.

4. The question whether the District Court should enjoin arbitration, when identical controlling issues are pending in an action before the court, is in no wise misleading, but accurately reflects a central problem posed by this case. Petitioner's verified second defense and counterclaim recites that "the principal issues involved in the arbitration proceeding are identical with those arising under the plaintiff's complaint and this counterclaim" (R 16), and Mr. Randall's uncontroverted affidavit (R 36) is to the same effect. Common both to the arbitration and the present proceedings in the District Court, and of paramount importance to each, is the factual determination whether the agreements involved in this litigation are interdependent. Thus, even though the ultimate legal issues to be resolved by the two tribunals are different, proceedings in each of the tribunals will necessarily involve presenting the same evidence, through the same witnesses, by the same counsel, for the purpose of proving the same questions of fact.

B. Respondent's Brief in Opposition Demonstrates a Further Important Reason for Granting the Writ

Although in its Court of Appeals brief respondent specifically indicated *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959), cert. granted 362 U.S. 909, cert. dismissed 364 U.S. 801, to be one of the cases it "chiefly relied on," respondent now disavows this reliance and asserts that its chief reliance is upon *United Steelworkers* v. *American Manufacturing Co.*, 363 U.S. 564 (1960), and upon *Drake Bakeries, Inc.* v. *Local 50,* 370 U.S. 254 (1962).

Unlike *Robert Lawrence,* these two cases do not purport to interpret the Arbitration Act with respect to commercial arbitration such as is here involved. Instead, they construe and apply section 301(a) of the Labor Management Relations Act, 61 Stat. 136, 156, 29 U.S.C. § 185, to the completely different problem of labor arbitration, a problem to which "the run of arbitration cases, illustrated by *Wilko* v. *Swan,* 346 U.S. 427" (a case chiefly relied upon by petitioner in the courts below) is "irrelevant." See *United Steelworkers* v. *Warrior & Gulf Navigation Co.,* 363 U.S. 574, 578 (1960).

Although the two labor arbitration cases chiefly relied upon by respondent do not represent standards established by this Court for the administration of commercial arbitration, respondent's reliance upon them for this purpose is a compelling indication that they will be so used unless this Court interposes. Such a radical and avulsive change in the accepted norms governing commercial practices should be permitted, if ever, only after this Court has given plenary consideration to the matter.

C. This Case Presents Important Issues Complementary to Those To Be Argued in No. 343.

Especially in view of respondent's reliance upon labor arbitration precedents, this case presents important legal issues complementary to those in another commercial arbitration case on which this Court has granted certiorari, i.e., No. 343, *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.,* now awaiting argument on the summary calendar. For this reason, as well as for the reasons set forth in the petition, this petition for writ of certiorari should be granted.

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